Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)

HIGH COURT (PENANG) — CIVIL SUIT NO 22-226-89
EDGAR JOSEPH JR J
22 JUNE 1992

Banking *— Banker and customer — Privilege of confidentiality — Order sought required chargee bank to disclose amount owed by chargor/customer without latter's consent — Whether order contravened Banking and Financial Institutions Act 1989 s 97 — Privilege that of chargor/customer — Whether chargor/customer had given requisite consent*

Civil Procedure *— High Court — Inherent powers — Orders made to prevent injustice or abuse of process of the court — Rules of the High Court 1980 O 92 r 4*

Civil Procedure *— Injunction — Application for interlocutory mandatory injunction — Standard of proof — Whether there was high degree of assurance that applicant will succeed at trial*

Civil Procedure *— Judgments and orders — Order made by court — Subsequent proceedings — Whether court bound by earlier order — Parties may not raise for second time in same suit issue already decided by court*

Civil Procedure *— Jurisdiction — High Court — Judgment of Supreme Court on matter — Separate and distinct remedy sought from High Court regarding same subject matter — Supreme Court not dealing with issues arising presently before High Court — Issues still at large for consideration of High Court*

Civil Procedure *— Jurisdiction — Interim preservation of property — Application for interlocutory mandatory order — Court may grant such order where appropriate — Courts of Judicature Act 1964 Sch para 6 — Rules of the High Court 1980 O 29 r 2(1) — National Land Code 1965 s 206(3)*

The plaintiff had commenced an action claiming, inter alia, an order for specific performance of a contract alleged to have been entered into with the defendant by which the defendant agreed to sell certain land owned by it to the plaintiff. The land was charged to the intervener, which was a bank. The plaintiff lodged a caveat in respect of the land. The intervener applied for an order for the removal of the caveat. The judge dismissed the application, holding that the plaintiff's claim disclosed a serious question to be tried as to whether there was any binding contract of sale and purchase in respect of the land (see [1990] 2 MLJ 482). The intervener appealed to the Supreme Court which allowed the appeal and ordered that the caveat be removed (see [1991] 1 MLJ 504). Following the disposal of the appeal, the plaintiff applied to the High Court for an interlocutory mandatory injunction the effect of which was that he be authorized by the defendant to tender the amounts due under the charge so as to redeem the charge. The plaintiff sought the injunction in order that the land, the subject

matter of the action, be preserved pending the trial of the action. At that time, the intervener as chargee of the land had already obtained an order for sale of the land under the provisions of the National Land Code 1965 ('the Code'). The letter, which was the basis of the alleged contract, contained expressed authorization for the utilization of the purchase price to pay the debt due under the charge in order to have the charge discharged.

It was contended for the defendant that the injunction, if granted, would fall foul of the judgment of the Supreme Court. It was contended for the plaintiff that the order sought for was an order in personam and could not therefore be ousted by the provisions of the Code. An order granting the application was made by the judge-in-chambers. It was contented in chambers that to grant the order would mean that the intervener would be required to disclose the amount owing under the charge by the defendant as chargor without the consent in writing of the defendant and that this would appear to be in contravention of the provisions of s 97 of the Banking and Financial Institutions Act 1989. The judge later heard further arguments in open court. The defendant brought further affidavit evidence in open court to support their contention that the circumstances of the case did not disclose a concluded contract of sale and purchase.

Held, affirming the order granting the application with qualification:

(1) All that had been decided by the Supreme Court was that the plaintiff had no rights of direct enforcement or discharge as against the intervener. The Supreme Court did not deal with the issues which arose for decision as between the plaintiff and the defendant in the instant case. The Supreme Court was not concerned with the claims in personam the plaintiff might have against the defendant. The question whether the plaintiff was entitled to the order for the injunction was thus at large notwithstanding the judgment of the Supreme Court.

(2) The court had jurisdiction to grant to the plaintiff an interlocutory mandatory order for preservation of the subject matter of the suit in aid of enforcing alleged contractual obligations, provided it would be appropriate to do so.

(3) A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. Nor may parties raise for a second time in the same suit an issue that has already been determined expressly or by necessary implication.

(4) There was a high degree of assurance that at the final hearing the plaintiff will succeed in establishing that there was a binding contract of sale and purchase. This was the higher standard of proof that was required for the grant of a mandatory interlocutory injunction.

(5) The plaintiff having failed to resist the intervener's attempt to remove the caveat was not prevented from seeking a separate and

distinct remedy as against the defendant for interim preservation of the subject matter in order to preserve the status quo until his claim was adjudicated upon. A

(6) The privilege of confidentiality was that of the customer who was the defendant and who by his letter had expressly authorized utilization of the proceeds of sale to discharge its liability to the intervener. This would amount to the required consent, at least implied, if not express. Moreover, the order sought would make the plaintiff the agent or receiver of the defendant for the limited purpose of paying off the amounts due under the charge in order to preserve the subject matter of the suit. As the intervener had already commenced proceedings and obtained an order for sale of the land, it had already disclosed the defendant's account. B C

Per curiam:

(1) Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. Expressions of judges must be understood in relation to the subject matter before the court. D

(2) The High Court has inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. E

[Bahasa Malaysia summary

Plaintif telah memulakan tindakan menuntut, antara lainnya, satu perintah pelaksanaan spesifik satu kontrak yang didakwa telah diikat dengan defendan dalam mana defendan bersetuju menjual suatu bidang tanah yang dipunyainya kepada plaintif. Tanah itu telah dicagarkan kepada pencelah, yang merupakan sebuah bank. Pencelah memohon untuk perintah pengetepian kaveat itu. Hakim telah menolak permohonan itu. Beliau memutuskan bahawa tuntutan plaintif menunjukkan satu soalan penting yang harus dibicarakan sama ada terdapat suatu kontrak jual beli yang mengikat berkenaan dengan tanah itu (lihat [1990] 2 MLJ 482). Pencelah telah merayu kepada Mahkamah Agung yang telah membenarkan rayuan itu dan memerintahkan pengetepian kaveat itu (lihat [1991] 1 MLJ 504). Berikutan dengan akhirnya rayuan itu, plaintif telah memohon kepada Mahkamah Tinggi untuk injunksi mandatori interlokutori yang membawa kesan bahawa beliau dibenarkan oleh defendan untuk membayar jumlah yang kena dibayar di bawah cagaran itu supaya boleh menebus cagaran itu. Plaintif telah memohon injunksi supaya tanah itu, yang menjadi perkara tindakan ini, dikekalkan sementara menantikan perbicaraan tindakan ini. Pada masa itu, pencelah sebagai pemegang cagaran tanah itu telah pun memperolehi satu perintah jualan tanah itu di bawah peruntukan Kanun Tanah Negara 1965 ('Kanun itu'). Surat yang menjadi asas kontrak yang didakwa itu F G H I

A mengandungi kebenaran nyata untuk penggunaan harga pembelian bagi pembayaran hutang yang kena dibayar di bawah cagaran itu supaya cagaran itu boleh dilepaskan.

Telah dihujahkan untuk defendan bahawa injunksi itu, jika diberikan, akan melanggar penghakiman Mahkamah Agung. Telah dihujah bagi plaintif bahawa perintah yang dipohon itu adalah satu perintah in B personam dan tidak boleh lantaran itu dialahkan oleh peruntukan Kanun itu. Satu perintah membenarkan permohonan itu telah dibuat oleh hakim dalam kamar. Telah dihujah dalam kamar bahawa untuk memberikan perintah itu akan bermakna yang pencelah akan di-kehendaki menyatakan jumlah yang terhutang di bawah cagaran itu C oleh defendan sebagai pemberi cagaran tanpa persetujuan bertulis defendan dan bahawa ini nampaknya bercanggah dengan peruntukan s 97 Akta Bank dan Institusi-Institusi Kewangan 1989. Hakim selepas itu telah mendengar hujah lanjut di mahkamah terbuka. Defendan telah mengemukakan keterangan afidavit lanjut di mahkamah terbuka untuk menyokong hujah mereka bahawa keadaan kes tidak menun- D jukkan satu kontrak jual beli yang mengikat.

Diputuskan, mengesahkan perintah membenarkan permohonan itu dengan kualifikasi:

(1) Apa yang telah diputuskan oleh Mahkamah Agung ialah bahawa E plaintif tidak mempunyai hak kepada pelaksanaan terus atau pelepasan terhadap pencelah. Mahkamah Agung tidak mempertim-bangkan isu yang timbul untuk keputusan di antara plaintif dan defendan di dalam kes sekarang ini. Mahkamah Agung tidak memutuskan tentang tuntutan in personam yang plaintif mungkin ada terhadap defendan. Soalan sama ada plaintif berhak kepada F perintah injunksi oleh itu masih belum diputuskan tidak kira penghakiman Mahkamah Agung.

(2) Mahkamah mempunyai bidang kuasa untuk memberikan plaintif satu perintah mandatori interlokutori untuk pengekalan bahan perkara guaman ini untuk membantu pelaksanaan obligasi kontrak G yang didakwa itu, dengan syarat ianya berpatutan yang mahkamah bertindak sedemikian.

(3) Satu keputusan yang diberikan oleh sebuah mahkamah pada satu peringkat atas sesuatu perkara tertentu atau isu akan mengikatnya pada peringkat terkemudian dalam guaman yang sama itu atau dalam satu guaman terkemudian. Bahkan pihak-pihak tidak boleh H menimbulkan buat kali kedua dalam guaman yang sama satu isu yang telah diputuskan secara nyata atau melalui implikasi yang berpatutan.

(4) Terdapat taraf kepastian yang tinggi bahawa di pendengaran akhir plaintif akan berjaya membuktikan bahawa terdapat satu kontrak I jual beli yang mengikat. Ini adalah taraf pembuktian yang lebih tinggi yang diperlukan untuk pemberian satu injunksi mandatori interlokutori.

(5) Plaintif walaupun telah gagal membangkang percubaan pencelah untuk mengetepikan kaveat itu tidak dihalang daripada memohon

satu remedi yang berasingan dan tersendiri terhadap defendan untuk pengekalan sementara bahan perkara itu supaya mengekalkan status quo sehingga tuntutannya diputuskan.

(6) Keistimewaan kerahsiaan adalah kepunyaan pelanggan yang merupakan defendan dan yang melalui suratnya telah secara nyata membenarkan penggunaan harga jualan untuk melepaskan tanggungannya kepada pencelah. Ini menunjukkan persetujuan yang diperlukan, setidak-tidaknya secara tersirat, jika bukan secara nyata. Lagipun, perintah yang dipohon itu akan menjadikan plaintif seorang ejen atau penerima bagi defendan untuk tujuan terhad membayar jumlah yang kena dibayar di bawah cagaran itu supaya mengekalkan bahan perkara guaman ini. Oleh kerana pencelah telah memulakan tindakan dan telah memperolehi satu perintah untuk jualan tanah itu, ia telah pun mengemukakan akaun defendan itu.

Per curiam:

(1) Setiap penghakiman harus dibaca sebagai terpakai kepada fakta-fakta tertentu yang dibuktikan, memandangkan yang ungkapan yang am yang mungkin terdapat di sana tidak bertujuan menjadi penjelasan keseluruhan undang-undang, tetapi dikawal dan dikenakan syarat oleh fakta-fakta tertentu kes di mana ungkapan sedemikian mungkin dijumpai. Ungkapan hakim-hakim mesti difahami berkenaan dengan perkara yang ada di depan mahkamah.

(2) Mahkamah Tinggi mempunyai kuasa sedia ada untuk membuat apa-apa perintah sebagaimana yang diperlukan untuk menghalang ketidakadilan atau untuk menghalang penyalahgunaan proses mahkamah.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–318–92.]

Cases referred to

1 *Tan Lay Soon v Kam Mah Theatre Sdn Bhd; Malayan United Finance Bhd v Tan Lay Soon* [1990] 2 MLJ 482 (refd)
2 *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504 (refd)
3 *Quinn v Leathem* [1901] AC 495 (refd)
4 *Moss v Gallimore* (1779) 1 Doug KB 279; 99 ER 182 (refd)
5 *Hood v Newby* (1882) 21 Ch D 605 (refd)
6 *Haji Abdul Rahman v Mahomed Hassan* [1917] AC 209 (refd)
7 *Eng Ah Mooi & Ors v Oversea-Chinese Banking Corporation Ltd* [1983] 1 MLJ 209 (refd)
8 *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260 (refd)
9 *Beddow v Beddow* (1878) 9 Ch D 89 (refd)
10 *Chaplin v Barnett* (1912) 28 TLR 256 (refd)
11 *Mercantile Bank Ltd v Official Assignee of the property of How Han Teh* [1969] 2 MLJ 196 (refd)

12 *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 (folld)
13 *Peareth v Marriott* (1883) 22 Ch D 182 (refd)
14 *Hook v Administrator-General of Bengal & Ors* 48 IA 187 (refd)
15 *In the matter of the trusts of the will of Tan Lye (deceased); Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ 113 (refd)
16 *Louis Drefus v Arunanchala Ayya* (1931) 58 IA 381 (refd)
17 *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670; [1986] 3 All ER 772 (refd)
18 *Manilal & Sons (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305 (refd)
19 *Astro Exito Navegacion SA v Southland Enterprise Co Ltd & Anor (Chase Manhattan Bank NA intervening)* [1982] 3 All ER 335; [1982] QB 1248; [1982] 3 WLR 296 (folld)
20 *Smith v Peters* (1875) LR 20 Eq 511 (folld)
21 *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 (folld)

Legislation referred to

Banking and Financial Institutions Act 1989 s 97
Contracts Act 1950 ss 70, 71
Courts of Judicature Act 1964 Sch para 6
National Land Code 1965 ss 206(3), 249(1), 266(2)
Specific Relief Act 1950 s 11(4)
Rules of the High Court 1980 O 20 r 1, O 29 r 2(1), O 92 r 4
Supreme Court Act 1981 [UK] s 37
Supreme Court of Judicature Act 1873 [UK] s 25(8)
Supreme Court of Judicature (Consolidation) Act 1925 [UK] s 45(1)

RR Sethu (*LS Tan & Co*) for the purchaser/plaintiff.
Wong Kim Fatt (*Christina Chia* with him) (*Christina Chia Ng & Partners*) for the chargor/defendant.
KL Loh (*Soo Thien Ming & Shahrizat*) for the chargee/intervener.

Edgar Joseph Jr J: In this judgment, unless the context otherwise requires, I shall, for brevity and convenience, refer to the plaintiff, the defendant and the intervener as 'the purchaser', 'the chargor' and 'the chargee', respectively.

On 3 January 1991, I had made orders in terms of prayers (a), (c), (d) and (f) of the purchaser's application, being encl 30, wherein he had prayed for the following reliefs:

(a) that the defendant authorize the plaintiff to redeem the lands held under Advance Issue Document Of Title for Holding 1095, and Geran Mukim 79 and 80 for Holdings 1610 and 1611 respectively in Mukim 12 Daerah Barat Daya Penang now charged to Malayan United Finance Bhd vide Charge Presentation No 6763/84, Jilid 298;
(b) alternatively, the plaintiff or the senior assistant registrar be authorized to redeem the said lands for and on behalf of the defendant and such redemption be treated as effected by the defendant;

(c) the titles so redeemed be retained in court pending the determination of this civil suit;
(d) the amount of moneys paid and expenses incurred by the plaintiff for the redemption be reserved to be dealt with at the trial of this suit;
(e) such further or other reliefs or directions; and
(f) the costs of the application be costs in the cause.

However, so far as prayer (a) was concerned, the extracted order did not reflect what was intended by the court when the order was pronounced in chambers and so would have been amenable to correction under the slip rule — O 20 r 11 of the Rules of the High Court 1980 ('RHC'). Be that as it may, the point became academic because I had granted the request for further argument by counsel for the chargor.

The background facts which have given rise to the proceedings now before me appear sufficiently from my judgment in *Tan Lay Soon v Kam Mah Theatre Sdn Bhd; Malayan United Finance Bhd v Tan Lay Soon*[1] and the judgment of the Supreme Court in *Malayan United Finance Bhd v Tan Lay Soon,*[2] allowing an appeal from that part of my judgment refusing the application of the chargee to remove the caveat lodged by the purchaser, and so need not be repeated.

The main plank in the submission of counsel for the chargor was that an order whereby the chargor was required to authorize the purchaser to redeem the lands concerned now charged to the chargee would fall foul of the judgment of the Supreme Court aforesaid and so could not be made.

It is axiomatic that every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found (*Quinn v Leathem,*[3] per Lord Halsbury at p 506). So, too, expressions of judges must be understood in relation to the subject matter before the court; see *Moss v Gallimore,*[4] per Buller J at p 283; *Hood v Newby.*[5]

Bearing these principles in mind, I note that in the course of its judgment, the Supreme Court in *Tan Lay Soon,*[2] at p 506 col 1H and I said:

> It may be necessary to recapitulate that as between the appellant and the respondent both in the High Court and before us the pivotal issue is the indefeasibility and priority of the charge over the caveats on the part of the appellant and the right of the respondent, in the respondent's own words, to redeem the charge on the part of the respondent.

And, in the penultimate paragraph of its judgment there appears the following passage which I consider to be the ratio decidendi:

> In the view we take of this appeal we are disposed to reject the respondent's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the National Land Code but we would affirm the right of the chargor or the borrower to discharge a charge under the annexure to the charge which is to be read together with s 249(1) of the Code which right ineluctably is not available to the respondent. Besides, under s 266(1) of the Code, the right to tender payment before the judicial sale is specifically and

exclusively granted to the chargor. The question of the competing right to discharge the charge on the part of the respondent does not arise at all and it follows, a fortiori, the priority of the charge prevails.

It is obvious from a reading of the judgment of the Supreme Court that all that had been decided was that, having regard to the decision of the Privy Council in *Haji Abdul Rahman v Mahomed Hassan,*[6] the purchaser had no rights of direct enforcement or discharge as against the chargee and so the judgment of Salleh Abbas FJ (as he then was), speaking for the Federal Court in *Eng Ah Mooi & Ors v Oversea-Chinese Banking Corporation Ltd,*[7] which held to the contrary (and upon which I had relied) was given per incuriam, and should not be followed.

Clearly, therefore, the Supreme Court did not deal with the issues which arose for decision as between the purchaser and the chargor. For example, there was no suggestion that I had erred in the view I had taken, that there was a serious question to be tried as to whether there was a binding contract of sale and purchase as between the purchaser and the chargor. This is understandable because the Supreme Court was not concerned with the in personam claims the purchaser might have against the chargor and, indeed, the chargor was not even a party to the appeal before the Supreme Court simply because he never appealed.

The question whether the purchaser is entitled to an order that he be authorized by the chargor to tender the amounts due under the charge to the registrar in order to have the charge cleared off the register, is thus at large notwithstanding the judgment of the Supreme Court in *Tan Lay Soon.*[2]

In the first place, I must consider whether there is jurisdiction to make the order prayed for in para (a) of encl 30 or, more correctly, something equivalent thereto. I say 'equivalent thereto' because as the chargor has no right of redemption in relation to the charged land conferred upon him by the Code or otherwise, he would be hardly in a position to authorize the purchaser to exercise such a right. The maxim is nemo dat quoad non habet. The chargor does, however, have the right to discharge the charge under the annexure to the charge read together with s 249(1) of the National Land Code 1965 ('the Code') or, in other words, the right to pay off the amounts specified under s 266(2) of the Code at any time before the conclusion of the judicial sale and he can therefore authorize the purchaser to exercise that right. To recapitulate, the question, therefore, which arises for decision regarding this part of the case is whether there is jurisdiction to require him to do so.

With regard to the extent of the court's jurisdiction to make orders for the interim preservation of property the subject matter of any cause or matter, it is to be observed that the Courts of Judicature Act 1964 enacts (by para 6 to the Schedule thereto) that the court may do so, 'by sale or by injunction or the appointment of a receiver or the registration of a caveat or a lis pendens *or in any other manner whatever*' (emphasis provided).

Paragraph 6 to the Schedule to the Courts of Judicature Act 1964 is equivalent to the English s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 or its predecessor s 25(8) of the Supreme Court

of Judicature Act 1873. (See *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd.*[8]) Speaking about the scope of the powers conferred by s 45(1), Jessel MR in *Beddow v Beddow*[9] said this at p 93:

> That being so, it appears to me that the only limit to my power of granting an injunction is whether I can properly do so. For that is what it amounts to ... I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles.

Also relevant is the protective measure of O 29 r 2(1) of the RHC which says:

> On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

The case of *Chaplin v Barnett*[10] shows that O 29 r 2(1) extends to every case in which the court sees that as between the parties something ought to be done for the security of the property the subject matter of the action or, as to which, a question may arise in the action.

Next, s 206(3) of the Code, serves as a reminder that independently of the Code, recognition must be accorded to equitable and contractual interests relating to alienated land or any interest therein notwithstanding the need for a proper instrument of dealing to be duly registered, as required under s 206(1) (per Raja Azlan Shah J (as he then was) in *Mercantile Bank Ltd v Official Assignee of the property of How Han Teh*[11]).

Now, a perusal of cl 5 of the letter dated 10 March 1989 (reproduced in [1990] 2 MLJ 482 at p 484), which is the basis of the alleged contract of sale and purchase, reveals that there is express authorization for the utilization of the purchase price to pay the debt due under the charge in order to have it cleared off the register.

In this context, it is also pertinent to note what Lord Russell of Killowen had said regarding the equitable jurisdiction of our courts to make orders in personam on grounds of conscience notwithstanding the provisions as to indefeasibility of the registered proprietor's title guaranteed under the Code when speaking for the Privy Council in *Oh Hiam & Ors v Tham Kong*[12] at p 164; this is how he puts it:

> It was contended by the defendant that this means what it says: he being on the register his title is indefeasible and accordingly the court cannot take it away from him, since it was neither alleged nor proved that there was fraud or misrepresentation to which he was a party, nor that his registration was obtained by forgery or by means of an insufficient or void instrument.
>
> Apart from authority their Lordships would not expect that the intervention of equity by a remedy in personam based upon a transaction to which the plaintiff and defendant were parties would be ousted by such provisions. The Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience. In the instant case the defendant could have shown an indefeasible title had he sold Lot 3660, a step

which he could not take because he undertook to the court not to: the court could have granted an injunction against sale, and that could scarcely have been described as an order inconsistent with his indefeasible title. If the registered proprietor were a trustee, his indefeasible title would not have precluded intervention by the court in execution of the trust: under the then Land Code there was no express provision for registration as trustee. The indefeasible title would not preclude an order for specific performance of a contract for sale by the proprietor. All these are instances of equity acting in personam, and indeed the order in the instant case may be described as an order in personam that the registered proprietor should defeat his own title.

I therefore consider that there is substance in the submission of counsel for the purchaser that the order equivalent to what he is contending for (as indicated above) is an order in personam within the principles enunciated by Lord Russell and could not therefore be said to be ousted by the provisions of the Code.

I am therefore satisfied that I have jurisdiction by virtue of the combined effect of para 6 of the Schedule to the Courts of Judicature Act 1964, O 29 r 2(1) of the RHC, s 206(3) of the Code and the principles enunciated by Lord Russell of Killowen in *Oh Hiam*'s case,[12] to grant to the purchaser an interlocutory mandatory order for preservation of the subject matter of the suit in aid of enforcing alleged contractual obligations, provided it would be appropriate to do so.

In the second place, I must consider whether I should, in the exercise of my *discretion*, grant to the purchaser the interlocutory order aforesaid.

It was further argued by counsel for the chargor that the contemporary documents in the case, including the correspondence, reproduced in my judgment aforesaid reported in [1990] 2 MLJ 482, and the circumstances of the case as a whole did not disclose a concluded contract of sale and purchase between the purchaser and the chargor in respect of the lands concerned. To put the point in his own words, 'at best the purchaser had a very weak case'. In support, he directed my attention to two new affidavits by a certain Yap Yee Choon, a director of the chargor, one being an affidavit in opposition dated 5 June 1992, and the other, a further affidavit dated 10 June 1992, which were, of course, not before me when I made the order in chambers on 3 January 1990.

With respect, I do not consider that I am at liberty to depart from the view I had expressed in my judgment aforesaid that the purchaser's claim did disclose a serious question to be tried as to whether there was any binding contract of sale and purchase, for it is trite law that a decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v Marriott*;[13] *Hook v Administrator-General of Bengal & Ors*;[14] *In the matter of the trusts of the will of Tan Lye (deceased); Yap Liang Neo v Tan Yew Ghee & Anor.*[15]) Nor may parties raise for a second time in the same suit an issue that has already been determined expressly or by necessary implication. (See *Louis Drefus v Arunanchala Ayya.*[16])

But, even if I were at liberty to reconsider the question whether there was a binding contract of sale and purchase, I see no reason whatever for departing from the view I had earlier expressed thereon in my judgment

([1990] 2 MLJ 482) wherein all the material evidence is set out and, indeed, I feel a high degree of assurance that at the final hearing the purchaser will succeed in establishing that there was a binding contract of sale and purchase. This is the higher standard of proof that is required for the grant of a mandatory interlocutory injunction which is in substance and effect the interlocutory order the purchaser now seeks.

But, I note that in *Films Rover International Ltd v Cannon Film Sales Ltd*[17] Hoffmann J stated that the fundamental principle in interlocutory applications for prohibitory and mandatory injunctions alike is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out at trial to have been 'wrong'. He continued:

> If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

I need hardly say that I have given the fullest consideration to the various submissions of counsel on all sides upon the hearing of further arguments in respect of the question whether there was a concluded contract of sale and purchase and I would uphold the submissions of counsel for the purchaser but without, of course, making a conclusive finding that there was a concluded contract of sale and purchase, for that can only be done at the final hearing.

Turning to the broader issues of justice and convenience, this involves a balancing exercise.

The purpose of the order contended for by counsel for the purchaser is to provide for the interim preservation of the subject matter of the suit herein, to wit, the lands concerned, by procuring the discharge of the charge registered against them as provided for in the alleged contract of sale and purchase. If the purchaser succeeds at the final hearing, then the probabilities are that he would be entitled, subject, of course, to the payment by him of the purchase price, to an order for specific performance by way of a transfer to him of the lands concerned (see s 11(4) of the Specific Relief Act 1950). If, on the other hand, the purchaser fails at the final hearing, the chargor would be entitled to keep his lands although the purchaser would most probably be entitled to reimbursement of the moneys he has advanced for the discharge of the charge (see ss 70 and 71 of the Contracts Act 1950).

As for the chargee, it will on no account be prejudiced in the event of the order prayed for by the purchaser being made, and complied with, for it will receive all moneys due to it under the charge and it cannot resort to its remedies under the Code.

On the other hand, if the purchaser is denied the remedy he now seeks, then even if he succeeds at the final hearing, he will most probably never obtain an order for specific performance but only damages, for by then, the land may very well have been disposed of having regard to the excalation in land prices since the date of the transaction.

Accordingly, in my view, the purchaser, having failed to resist the chargee's attempt to remove the caveat is not prevented from seeking a separate and

distinct remedy as against the chargor for interim preservation of the subject matter in order to preserve the status quo until his claim is adjudicated upon. If, in certain circumstances, as against the same party, a plaintiff may be entitled to both a caveat and an injunction (see *Manilal & Sons (M) Sdn Bhd v M Majumder*[18]), I fail to see why, having failed to resist removal of a caveat by one party, a plaintiff may not, in appropriate circumstances, obtain an order whose object is to ensure interim preservation of the subject matter of the litigation against another party.

Lastly, it was contended in chambers, though not on hearing further arguments, that to grant the purchaser the order he now seeks would mean that the chargee would be required to disclose the amount owing under the charge by the chargor without the consent in writing of the chargor and this would appear to be in contravention of the provisions of s 97 of the Banking and Financial Institutions Act 1989.

In my view, there is no substance in this submission. The privilege of confidentiality is that of the customer who is the chargor and who by cl 5 of his letter dated 10 March 1989 had expressly authorized utilization of the proceeds of sale to discharge its liability to the chargee. This would amount to the required consent, at least implied, if not express.

Moreover, by virtue of the order for interim preservation of the subject matter which the purchaser now seeks, he would become the agent or receiver of the chargor for the limited purpose of paying off the amounts due under the charge in order to preserve the subject matter.

Furthermore, the bank has already commenced proceedings to enforce the charge being OS 749/89 and had gone on to obtain an order for sale. This, of course, means that it has already disclosed the chargor's account. All that the purchaser wants now is an updated account of the chargor in order to effect payment to the chargee.

Looking back, I must add that I had also paid special regard to the interests of all parties concerned, keeping in mind their foreseeable positions, considerations of hardship, the balance of convenience and all other relevant discretionary factors.

In the result, I would affirm the order I had made in chambers on 3 January 1991, with the qualification that I would substitute the words 'it is ordered that the defendant do authorize the plaintiff to discharge the charge bearing presentation No 6763/84, Jilid 298 Folio 78, created over the lands held under Advance Issue Document of Title for Holding 1095 and Geran Mukim 79 and 80 for Holdings 1610 and 1611, respectively, all in the Mukim 12 Daerah Barat Daya, Penang, now charged to Malayan United Finance Bhd the chargee/intervener, by tendering the amounts specified in s 266(2) of the Code to the registrar of the court before the conclusion of the judicial sale' for the words 'it is ordered that the plaintiff be and is hereby authorized to redeem the said lands held under Advance Issue Document of Title for Holding 1095 and Geran Mukim 79 and 80 for Holdings 1610 and 1611 respectively all in the Mukim 12 Daerah Barat Daya, Penang, now charged to Malayan United Finance Bhd vide charge Perserahan No 6763/84 Jilid 298 Folio 78'.

The chargor will have to pay the costs of the proceedings to the purchaser.

Since settling this judgment in draft, my attention has been drawn earlier today by counsel for the purchaser, to the judgment of the Court of Appeal in England in *Astro Exito Navegacion SA v Southland Enterprise Co Ltd & Anor (Chase Manhattan Bank NA intervening)*[19] where it was held that under s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, replaced by s 37 of the Supreme Court Act 1981, which is equivalent to, though not as widely drawn, as our para 6 of the Schedule to the Courts of Judicature Act 1964), the court has jurisdiction, where it appears just and convenient to do so, to order interim relief by granting an interlocutory mandatory injunction to enforce a contractual obligation before trial. In so holding, the Court of Appeal had followed *Smith v Peters*[20] in which it was held that the court has jurisdiction to make *any* interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing of the cause.

The cases of *Astro*[19] and *Smith v Peters*,[20] were cited with approval by the Federal Court in *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd*[21] wherein reference was also made to the provisions of O 92 r 4 which reminds the High Court of its inherent powers to make *any orders* as may be necessary to prevent injustice or to prevent an abuse of the process of the court. I am fortified in the conclusion at which I have arrived by these authorities.

Order accordingly.

Reported by PS Ranjan